

TITLE 3. DEPARTMENT OF PESTICIDE REGULATION  
Methyl Bromide Field Fumigations  
DPR Regulation No. 10-002

NOTICE OF PROPOSED REGULATORY ACTION

The Department of Pesticide Regulation (DPR) proposes to amend Title 3, California Code of Regulations (3 CCR) sections 6447, 6447.2, and 6784. The pesticide regulatory program activities that will be affected by the proposal are those pertaining to restricted materials and worker safety. In summary, the proposed action pertains to the use of methyl bromide when used to fumigate soil prior to the planting of agricultural crops and focuses on mitigating possible subchronic (intermediate) methyl bromide exposure hazards to the public and agricultural employees. The proposed action would revise the limits on the amount of methyl bromide that can be applied in any calendar month in any township; prohibits county agricultural commissioners (CACs) from using buffer zone sizes smaller and durations shorter than specified in the *Methyl Bromide Field Fumigation Buffer Zone Determination* document incorporated by reference; revises the maximum employee work hours in a 24-hour period, while engaged in the injection process and during the restricted entry interval for various methods of applications; and makes a clarifying change to the description of the National Institute for Occupational Safety and Health (NIOSH)-certified respirator that must be used when required by employees involved in field fumigation.

SUBMITTAL OF COMMENTS

Any interested person may present comments in writing about the proposed action to the agency contact person named below. Written comments must be received no later than 5:00 p.m. on June 1, 2010. Comments regarding this proposed action may also be transmitted via e-mail <dpr10002@cdpr.ca.gov> or by facsimile transmission at (916) 324-1452.

A public hearing is not scheduled. However, one will be scheduled if any interested person submits a written request to DPR no later than 15 days prior to the close of the written comment period.<sup>1</sup>

EFFECT ON SMALL BUSINESS

DPR has determined that the proposed regulatory action does affect small businesses.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Methyl bromide is a gaseous fumigant used to treat soil before planting vegetable, fruit, and nut crops and flowers. Depending on the crop, field applications may occur annually or once every several years. Methyl bromide is injected into the soil with specialized application equipment that lays tarpaulins over the ground to minimize off-gassing for several days. Methyl bromide is also used in other settings not covered by this rulemaking action. For example, after harvest,

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<sup>1</sup> If you have special accommodation or language needs, please include this in your request for a public hearing. TTY/TDD speech-to-speech users may dial 7-1-1 for the California Relay Service.

methyl bromide fumigation is used to protect crops from pest damage during storage and transportation. The fumigant is also used for quarantine pest control; termite eradication in homes and other structures; and to control insects in mills, ships, railroad cars, and other transportation vehicles.

In late December 2000, DPR adopted regulations focused upon mitigating possible acute (short-term) methyl bromide exposure hazards to the public and agricultural employees. These regulations are found in 3 CCR. In September 2004, DPR submitted regulations to the Office of Administrative Law (OAL) (File No. 04-0921-01C) that, in part, focused on mitigating subchronic methyl bromide exposure hazards to the public and agricultural employees. Subchronic exposure refers to seasonal exposure to workers and the public over a period of weeks. The regulations were approved by OAL on November 3, 2004. As required by Food and Agricultural Code (FAC) sections 12980 and 12981, the Office of Environmental Health Hazard Assessment (OEHHA) provided DPR with health-based recommendations.

In December 2004, a lawsuit was filed [*Fernandez v. Department of Pesticide Regulation (San Francisco County Superior Court No. CPF-04-504781)*] alleging, in part, that the regulations were not developed jointly and mutually with OEHHA and were not based on OEHHA's recommendations. On February 24, 2006, the judge found that DPR violated its duty to develop the regulations jointly and mutually with OEHHA and did not base the regulations on OEHHA's recommendations. DPR appealed this decision. In July 2008, the First Appellate District Court of Appeal [*Fernandez v. Department of Regulation (164 Cal. App. 4<sup>th</sup> 1214)*] affirmed the lower court decision. The Court concluded that DPR must collaborate with OEHHA in determining the health risks from methyl bromide. DPR was ordered to repromulgate sections of the regulations jointly and mutually with OEHHA.

DPR and OEHHA jointly and mutually began developing regulations to mitigate the health effects to workers resulting from subchronic exposure to methyl bromide pursuant to FAC section 12980. OEHHA agreed that DPR, as the risk manager, would develop a risk management directive to provide parameters for the development of amendments to 3 CCR sections 6447(h) and 6784(b)(3)(B) to mitigate the health effects to bystanders and workers resulting from subchronic exposures to methyl bromide. OEHHA agreed to work with DPR to implement that risk management directive.

On September 21, 2009, DPR issued a risk management directive that established a range of regulatory target levels unlikely to cause adverse health effects, and enumerated the factors that were taken into consideration in making that determination, including OEHHA's health-based recommendations. DPR and OEHHA staff were directed to develop mitigation measures to meet the range of specific target levels identified in that directive. Upon completion of OEHHA and DPR staff work based on the September 21, 2009 risk management directive, DPR issued a risk management decision on January 29, 2010. It directed OEHHA and DPR staff to develop specific regulatory amendments that would establish mitigation measures designed to reach the regulatory target levels identified in the DPR risk management decision. The decision was based upon the feasibility and practicality of implementing the mitigation measures for each target level, and the ability of DPR and the county agricultural commissioners (CACs) to adequately enforce them.

Under the risk management decision, the regulatory target level was lowered to the more health protective level of five parts per billion. DPR proposes to reduce the maximum amount of methyl bromide that can be applied for agricultural use in any township in a calendar month in section 6447(h). Under this proposal, a township cap will be established at 171,625 pounds. Township caps will be enforced via permit conditions.

DPR proposes to amend subsection 6447.2(a) to prohibit CACs from using buffer zone sizes smaller and durations shorter than specified in the *Methyl Bromide Field Fumigation Buffer Zone Determination* document. Also, the publication date for DPR's *Methyl Bromide Field Fumigation Buffer Zone Determination* document, which is already incorporated by reference into regulation, is being revised to "Rev. 3/10." The referenced document has been updated to change citations to sections 6450.1 and 6450.2, to 6447.1 and 6447.2, respectively, to reflect the renumbering of those sections in previous rulemaking. A copy of the revised document is included in the rulemaking file and is available upon request from DPR.

DPR proposes to amend section 6784(b)(2)(C) to clarify that when respiratory protection is required, employees must wear NIOSH-certified respiratory protection specifically recommended for use in atmospheres containing five ppm or less methyl bromide.

DPR proposes to amend section 6784(b)(3)(B) by revising the work hours in "Table 1. Maximum Work Hours" to reduce possible subchronic exposure of methyl bromide to or below a more health protective target level of 13 parts per billion (24-hour time-weighted average concentration) to workers. Additionally, DPR proposes to amend the heading "Maximum Application Rate (lbs. actual methyl bromide)" in Table 1 and Table 2 to include "per acre" to clarify that the application rate is measured as pounds per acre.

#### IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts, nor does it require reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the regulatory action does not constitute a "new program or higher level of service of an existing program" within the meaning of section 6 of Article XIII of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action.

CACs will be the local agencies responsible for enforcing the proposed regulations. DPR anticipates that there will be no fiscal impact to these agencies because CACs will be following the same permit evaluation process that is currently performed.

### COSTS OR SAVINGS TO STATE AGENCIES

DPR has determined that no savings or increased costs to any state agency will result from the proposed regulatory action.

### EFFECT ON FEDERAL FUNDING TO THE STATE

DPR has determined that no costs or savings in federal funding to the state will result from the proposed action.

### EFFECT ON HOUSING COSTS

DPR has made an initial determination that the proposed action will have no effect on housing costs.

### SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESSES

DPR has made an initial determination that adoption of this regulation would have no significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

### COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

DPR identified potential cost impacts that a representative private person or businesses would necessarily incur in reasonable compliance with the proposed action. Strawberry growers and strawberry nursery stock producers may be impacted by the proposed action that revises the amount of methyl bromide that can be applied in any township in a calendar month to 171,625 pounds. Strawberry growers may experience an estimated annual cost savings of \$309,000 by substituting methyl bromide with another pesticide such as chloropicrin. Strawberry nursery stock producers in the affected township may incur an estimated annual reduction in net profit of \$126,000. The impacts are presented by township and aggregated to a statewide total. The overall statewide impact is an estimated annual cost savings of \$183,000 (\$309,000 cost savings for strawberry growers minus \$126,000 annual reduction in net profit for nursery stock producers). The impact on nursery stock producers was estimated to be a reduction in net profit of nine percent. This would be considered a significant impact on nursery stock producers if they cannot pass along their cost as an increase in the price of strawberry plants (by about one percent) to strawberry growers. To the extent that they can pass the cost to strawberry growers as strawberry plant price increases, nursery stock producers will not see a significant impact from the proposed methyl bromide township cap. Strawberry growers can pay for the plant price increase from their chloropicrin use cost savings. Strawberry consumer will not see an increase in the price of strawberries at the grocery store.

## IMPACT ON THE CREATION, ELIMINATION, OR EXPANSION OF JOBS/BUSINESSES

DPR has determined it is unlikely the proposed regulatory action will impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California.

## CONSIDERATION OF ALTERNATIVES

DPR must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons or businesses than the proposed regulatory action.

## AUTHORITY

This regulatory action is taken pursuant to the authority vested by FAC sections 11456, 12976, 12981, 14005, and 14102.

## REFERENCE

This regulatory action is to implement, interpret, or make specific FAC sections 11501, 12981, 14006, and 14102.

## AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

DPR has prepared an Initial Statement of Reasons, and has available the express terms of the proposed action, all of the information upon which the proposal is based, and a rulemaking file. A copy of the Initial Statement of Reasons and the proposed text of the regulation may be obtained from the agency contact person named in this notice. The information upon which DPR relied in preparing this proposal and the rulemaking file are available for review at the address specified below.

## AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the close of the comment period, DPR may make the regulation permanent if it remains substantially the same as described in the Informative Digest. If DPR does make substantial changes to the regulation, the modified text will be made available for at least 15 days prior to adoption. Requests for the modified text should be addressed to the agency contact person named in this notice. DPR will accept written comments on any changes for 15 days after the modified text is made available.

## AGENCY CONTACT

Written comments about the proposed regulatory action; requests for a copy of the Initial Statement of Reasons, the proposed text of the regulation, and a public hearing; and inquiries regarding the rulemaking file may be directed to:

Linda Irokawa-Otani, Regulations Coordinator  
Office of Legislation and Policy  
Department of Pesticide Regulation  
1001 I Street, P.O. Box 4015  
Sacramento, California 95812-4015  
(916) 445-3991

Note: In the event the contact person is unavailable, questions on the substance of the proposed regulatory action may be directed to the following person at the same address as noted above:

Linda O'Connell, Senior Environmental Scientist  
Worker Health and Safety Branch  
(916) 445-1717

This Notice of Proposed Action, the Initial Statement of Reasons, and the proposed text of the regulation are also available on DPR's Internet Home Page <<http://www.cdpr.ca.gov>>.

## AVAILABILITY OF FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons mandated by Government Code section 11346.5(a)(19) may be obtained from the contact person named above. In addition, the Final Statement of Reasons will be posted on DPR's Internet Home Page and accessed at <<http://www.cdpr.ca.gov>>.

## DEPARTMENT OF PESTICIDE REGULATION

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Director

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Date